

U.S. Application Serial No. 10/603,279
Office Action Mailed November 15, 2007
Amendment in response filed on May 15, 2008

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REMARKS

The Applicants thank the Examiner for the consideration shown to the present application thus far. Claims 1, 3, 5, and 10-15 are still pending.

35 U.S.C. § 103 Rejection

Claims 1, 3, 5, and 10-15 remain rejected under 35 U.S.C. § 103(a) as being unpatentable over Elder, et al. The Applicants respectfully traverse this rejection, and respectfully request that the Examiner reconsider this rejection in light of the Declaration under 37 C.F.R. 1.131 submitted herewith.

Submitted herewith is a Declaration under 37 CFR 1.131 of Dr. David Vincent Zyzak attesting that he was in possession of the presently claimed invention prior to September 19, 2002, which is the filing date of the Elder '504 application. The Declaration has been corrected, as requested by the Examiner, to indicate that in fact Dr. Zyzak was in possession of the invention of the present application prior to the effective date of the Elder '504 application. Accordingly, the Elder '504 application should be removed as prior art, and the rejections based on the Elder '504 application should be withdrawn.

Moreover, submitted herewith is what is believed to be a true and accurate copy of the decision of the Board of Patent Appeals and Interferences (BPAI) involving the Zyzak 10/606,137 application. The decision orders a judgment of priority to Zyzak in that Zyzak was both the first to conceive and first to reduce to practice the subject matter of the count [i.e. count 1] and that priority of invention lies with Zyzak. It is respectfully requested that the Examiner consider the decision of the BPAI in his patentability decision in the present application.

Thus, Applicants respectfully request reconsideration and withdrawal of the rejections of Claims 1, 3, 5 and 10-15 over the Examiner's 35 U.S.C. § 103(a) rejection in view of Elder '054.

Double Patenting – Non-Statutory

Claims 1, 3, 5, and 10-15 remain provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-32 and 42-50 of co-pending Application No. 10/606,137. If the claims are still rejected

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under the judicially created doctrine of obviousness-type double patenting after the rejections addressed above are resolved, then the Applicants will file an appropriate Terminal Disclaimer.

Claims 11-15 remain provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over Claims 1-9 of U.S. Patent No. 6,989,167. If the claims are still rejected under the judicially created doctrine of obviousness-type double patenting after the rejections addressed above are resolved, then the Applicants will file an appropriate Terminal Disclaimer.

Conclusion

The Examiner's rejection based on 35 U.S.C. § 103 and the judicially created doctrine of double patenting have all been addressed. Moreover, it is believed that all of these rejections have been overcome. Applicants respectfully request reconsideration and issuance of the present application.

Respectfully submitted,
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